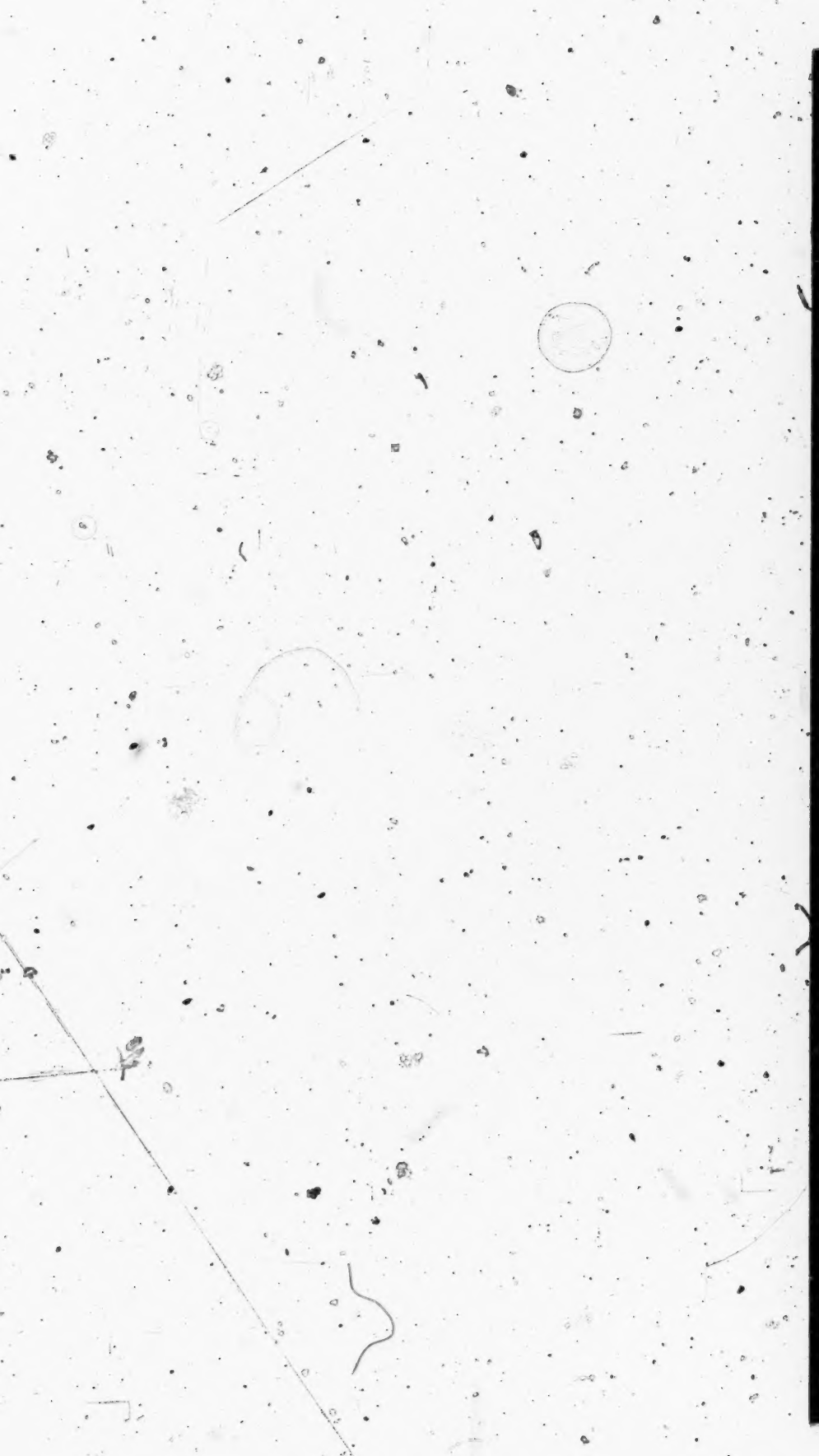

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, PETITIONER

v.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

No. 554

L. ELWOOD DIZE, TRADING AS DIZE BOX COMPANY, PETITIONER

v.

LAKE MADDRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

OPINIONS BELOW

No. 445

The Municipal Court of the City of New York, Borough of Manhattan, First District, dismissed

the complaint without opinion (R. 69). The opinion of the Appellate Term of the New York Supreme Court (R. 79–80), reversing the Municipal Court, is reported at 180 Misc. 542. The opinion of the Appellate Division, First Department (R. 90–102), affirming the Appellate Term (except for counsel's fee which was modified), is reported at 267 App. Div. 317. The Court of Appeals of the State of New York affirmed the Appellate Division without opinion.

No. 554

The opinion of the District Court for the District of Maryland (R. 59–61), rendering a judgment in favor of the plaintiff, is not officially reported but is printed in 7 Wage Hour Rept. 313. The opinion of the Court of Appeals for the Fourth Circuit (R. 64–66), affirming the District Court, is reported at 144 F. (2d) 584.

JURISDICTION

No. 445

The Court of Appeals of the State of New York issued its remittitur on June 14, 1944 (R. 105). The petition for writ of certiorari was filed September 8, 1944 and granted, limited to question (2), on November 6, 1944. The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

No. 554

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on August 1, 1944 (R. 66). The petition for certiorari was filed on October 6, 1944 and granted, limited to question 2 (d), on November 13, 1944. The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the validity of the alleged releases is governed by federal or by state law.

(2) Whether any part of the liability for unpaid wages and liquidated damages provided by Section 16 (b) can be validly released by private agreement.

STATUTE INVOLVED

The sections of the Fair Labor Standards Act primarily involved are Sections 2, 6 (a) (1–4), 7 (a), and 16 (b). These sections appear in the Appendix, *infra,* pages 25–27.

STATEMENT

No. 445

William J. O'Neil, respondent in No. 445, was employed by petitioner as a night watchman in its eleven-story business building located at 443 Fourth Avenue, New York City, from November 5, 1938 to August 30, 1940 (R. 19). Though a substantial portion of that building was devoted

to the production of goods for commerce (R. 25–50),[1] petitioner failed to pay O'Neil the overtime compensation he had earned under Section 7 of the Act.[2] On November 13, 1942, however, over two years after O'Neil had left petitioner's service, petitioner computed the statutory overtime compensation due O'Neil and offered him a check for $432.16 in return for a release of all his rights under the Act (R. 54–55). O'Neil signed the re-

[1] Petitioner does not challenge the decisions below on the question of coverage under the Act; it suggests, however, that the coverage was doubtful because no manufacturing was permitted in the building (br. of petitioner *Brooklyn Savings Bank*, pp. 3–4, and note 2) and because "none of * * * the tenants were engaged in any actual and substantial production for interstate commerce" (id. p. 5, note 3). In the light of this Court's decisions (see *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540), the record in this case admits no doubt that the employee was covered by the Act. Despite the covenants against manufacturing contained in the leases (R. 56–57), at least two of the tenants, occupying approximately 1½ floors, manufactured gloves and glove specimens in the building and regularly shipped them outside the state (R. 32–33, 45–47). In any event, manufacturing is not the sole basis on which respondents' coverage can be sustained, e. g., three of the eleven floors in the building as well as the basement were occupied by a furnitutre company which received 80 or 90%, and shipped about half, of its goods outside of the state (R. 25–31). The latter company, in addition to being engaged in the shipment of goods in interstate commerce, was also engaged in their production for commerce inasmuch as it was engaged in the finishing and assembling of the furniture which it sold (R. 28, 29).

[2] Cf. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540.

lease[*] and took the check (R. 23). Subsequently, he filed this suit to recover the liquidated damages due him under Section 16 (b) of the Act (R. 4–7).

The Municipal Court dismissed the complaint without opinion (R. 66–67, 69) but the Appellate Term reversed per curiam (R. 74–75, 79–80). The Appellate Division affirmed per curiam (R. 90–91) on the ground that there was "no escape from the statutory language," and the Court of Appeals affirmed without opinion (R. 105). The Municipal Court, upon the Court of Appeals' remittitur, entered final judgment for respondent (R. 108–110).

No. 554

This also is a suit under Section 16 (b). It was brought by respondent, Maddrix, to recover

[*] The release stated that "Whereas, the undersigned has demanded overtime pay * * *; and Whereas, the actual amount of overtime pay due * * *, if any such overtime is due, is difficult of ascertainment; and Whereas, there is uncertainty as to whether the undersigned has an enforceable claim; and Whereas, the parties desire to settle said claim without litigation, and thus to avoid the delays and uncertainties incident thereto; Now Therefore, the undersigned, in consideration of the payment to him of the sum of $427.43 * * * accepts said payment as full settlement of all of his claims for overtime employment, and releases and discharges the 'Employer' * * * from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment as aforesaid, * * *." (R. 11–12.)

The employee testified that he never read the release (R. 24). There was no discussion either of coverage or of the amount between the parties at the time petitioner gave respondent the check (R. 23–24, 54–55, 64–66).

the balance of statutory wages due him under Section 7 together with liquidated damages equal to the entire amount of wages belatedly paid to him.

Maddrix was employed by petitioner as a "working foreman" making boxes and barrels (R. 17) which subsequently moved in interstate commerce (R. 64–65).[4] From October of 1938, the effective date of the Act, until October of 1941, he worked 60 hours a week, and thereafter 57 hours one week and 55 hours the next until the end of his employment in November of 1942, without being compensated as provided by Section 7 (R. 16).

In November of 1942, Dize tendered to Maddrix $500 for wages due and owing under the Fair Labor Standards Act (R. 19). Maddrix accepted the money and signed a general release of all his claims against Dize (R. 19), although both parties

[4] The opinion of the Fourth Circuit states that "Dize contends that he was not engaged in the production of goods for shipment in interstate commerce so as to bring him within the purview of the Act" (R. 64). This question, however, was raised for the first time on appeal to that court. Prior to that time the question was not in issue (R. 14–15). In fact, petitioner in his answer admitted Maddrix was engaged in "the production of goods for commerce within the meaning of the Act" (par. V, R. 6, answering par. V of the Complaint, R. 2). The question of coverage, therefore, was not an issue between the parties at the time of the settlement.

knew that "something in addition appeared to be due" (R. 60).[5]

Shortly thereafter, respondent engaged counsel to recover the balance due him under the Act (R. 31). Before suit was filed, Dize tendered Maddrix' attorney a check for $290.97, the balance of the statutory wages due, but the latter refused to accept the check because it was offered "to bring the matter to an end" without making any payment of liquidated damages (R. 57–58). Suit was thereupon entered for $276.05, the balance of the statutory wages due respondent,[6] and $776.05, liquidated damages equal to the whole amount unlawfully withheld (R. 1–5).

The District Court entered judgment for Maddrix (R. 61) on the authority of *Guess* v. *Montague*, 140 F. (2d) 500, decided by the Fourth Circuit Court of Appeals on September 16, 1943, which held that a settlement or release for less than the full statutory wages due under the Fair Labor Standards Act is void. This judgment was affirmed by the Circuit Court of Appeals (R. 66).

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[5] In September of 1942, an injunction had issued against Dize by consent, prohibiting him from violating the Fair Labor Standards Act (R. 9). Both Dize and Maddrix were in touch with the Wage-Hour inspector at Salisbury who had inspected petitioner's books (R. 19–20), and it was through him that both knew that the amount owed was between seven and eight hundred dollars (R. 20, 31–33).

[6] It was discovered before suit was entered that petitioner had complied with the Act during the last three weeks of Maddrix' employment. The amount of statutory wages sued for was reduced accordingly to $276.05 from $290.97, the amount previously believed to be due (R. 17).

ARGUMENT

I

THE QUESTION OF THE VALIDITY OF THE ALLEGED RELEASES IS A FEDERAL QUESTION GOVERNED BY FEDERAL LAW

In granting certiorari in *Dize* v. *Maddrix*, No. 554, the Court requested counsel to discuss the question whether the validity of the alleged release or accord is governed by federal or by state law. We agree with petitioner, Brooklyn Savings Bank, that the question is governed by federal law (See Brooklyn Savings Bank br., p. 9). In a consistent line of recent decisions by this Court, it has been established that "in the interpretation and application of federal statutes, federal not local law applies" (*Prudence Corp.* v. *Geist*, 316 U. S. 89, 95), and that where a claim is derived from a federal statute, "the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245, 246. See also *Deitrick* v. *Greaney*, 309 U. S. 190, 200–201; *Jerome* v. *United States*, 318 U. S. 101, 104; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123; *Board of Commissioners* v. *United States*, 308 U. S. 343, 351; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 459, 468–469;

Midstate Horticultural Co. v. *Penna. R. Co.*, 320 U. S. 356; *McKenzie* v. *Irving Trust Co.*, No. 188, this Term, decided January 8, 1945. While particular Federal statutes may be interpreted as adopting rules of state law (see *Board of Commissioners* v. *United States, supra; Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144), the above line of decisions clearly settles the point that state law is not controlling as such, and that it is not to be viewed as adopted by the federal statute where it is inconsistent with or would impair the federal statutory policy. See particularly *Jerome* v. *United States, supra; Sola Electric Co.* v. *Jefferson Electric Co., supra*, and *National Labor Relations Board* v. *Hearst Publications, supra.*

II

THE EFFECT OF A RELEASE UPON LIABILITY UNDER THE FAIR LABOR STANDARDS ACT

Although ordinarily the law permits parties to compromise their disputes, it is well established that a statutory right affecting the public interest may not be waived or released if such a release contravenes the statutory policy. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Midstate Horticultural Co.* v. *Penna. R. R. Co.*, 320 U. S. 356. In the *Midstate Horticultural* case, this Court held that a shipper may not release his right to plead the three-year statute of limitations provided by Section 16 (3) (a) of the Interstate Commerce Act for actions by carriers for the recovery of freight charges, pointing out that "in respect to many matters concerning which

variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required."

Whether or not a statutory right may be released by an individual beneficiary depends upon the intention of Congress as manifested in the particular statute. "Whether the policy of interstate commerce legislation contemplates the one result or the other * * * is the controlling question." *Midstate Horticultural Co.* v. *Penna. R. R. Co.*, 320 U. S. at 360.[7]

These principles unquestionably preclude any legal surrender of the amount of the minimum wages and overtime compensation required to be paid by Sections 6 and 7 of the Fair Labor Standards Act. These sections make it mandatory that employers pay employees the specified minimum wages and overtime compensation. Any contract, whether by way of release or otherwise, whereby an employee is to receive less than the amounts prescribed in these sections is illegal. The decisions are substantially uniform to that effect.[8]

[7] Inasmuch as the nature of the right depends upon the meaning and policy of the particular statute, decisions involving other statutes with different provisions and purposes are not controlling.

[8] All of the decisions of the circuit courts of appeals are in agreement to this extent. *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4);

Much more troublesome and difficult is the question as to the right of an employer to escape liability for liquidated damages by payment of the full amount due under Sections 6 and 7 in return for a release from any further claims. Although the circuit courts of appeals agree that mere payment of the unpaid wages does not abrogate the liability for liquidated damages,* they

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Atlantic Co. v. *Broughton*, 7 Wage Hour Rept. 1168 (C. C. A. 5, 1944); *Post* v. *Fleming*, 7 Wage Hour Rept. 1206 (C. C. A. 2, 1944); *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7). Cf. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602. Virtually all of the decisions of the state courts and of the federal district courts are likewise in agreement that the base requirements of Sections 6 and 7 of the Act cannot be waived or released by private agreement. See *Clarke* v. *126 Fifth Avenue Corp.*, 7 Wage Hour Rept. 427 (S. D. N. Y. 1944); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (D. Mass.); *Engel* v. *Justrite Handkerchief Co.*, 6 Wage Hour Rept. 614 (Sup. Ct. N. Y., 1943); *Fiedler* v. *Potter*, 172 S. W. (2d) 1007 (Sup. Ct. Tenn.); *Cassese* v. *Manufacturers Trust Co.*, 46 N. Y. S. (2d) 621 (N. Y. C. Ct.); *Campbell* v. *Mandel Auto Parts Corp.*, 5 Wage Hour Rept. 56 (Sup. Ct. N. Y., 1941); *Greenbaum* v. *Meadow Provision Co.*, 5 Wage Hour Rept. 919 (Sup. Ct. N. Y., 1942).

For cases inconsistent with the weight of authority, see *Ortiz* v. *Compania Cervecera de Puerto Rico*, 6 Wage Hour Rept. 345 (D. P. R., 1943); *David* v. *Atlantic Co.*, 26 S. E. (2d) 650 (C. A. Ga.); *Thorpe* v. *Nash-Finch Co.*, 5 Wage Hour Rept. 878 (N. D. Okla., 1942); *Rodriguez* v. *Corporation Azucarera Sauri y Subria*, 5 Wage Hour Rept. 956 (D. P. R., 1942).

*See the decisions cited at the beginning of the previous footnote.

are divided as to the binding quality of a payment accompanied by a release.[10] The Second and Seventh Circuits hold such releases void on the ground that the cause of action created by the statute for original and liquidated damages is clearly single and not subject to compromise;[11] the Tenth Circuit is seemingly of the same view.[12] The Fourth and Fifth Circuits, on the other hand, distinguish the liquidated damages on the ground that there is a mandatory obligation imposed by the statute and enforceable by the Government to pay the amounts originally due, but only a personal liability to the employee as to the liquidated damages which is severable and subject to compromise or waiver by him.[13]

The language of the statute is not very explicit on the point. Section 16 (b) merely provides:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be

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[10] A release is, of course, not binding without consideration. There is consideration in case of a liquidated claim only where there is a *bona fide* dispute as to liability. *Fire Insurance Ass'n., Ltd.*, v. *Wickham*, 141 U. S. 564, 577; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Clark*, 178 U. S. 353, 366. All the circuits agree that a release of the liquidated damages under the Fair Labor Standards Act is invalid unless such a dispute exists. See cases cited in note 8, *supra*.

[11] *Birbalas* v. *Cuneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7); *Post* v. *Fleming*, 7 Wage Hour Rept. 1206 (C. C. A. 2, 1944). Cf. *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2).

[12] *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10), certiorari denied, 320 U. S. 772.

[13] *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4); *Atlantic Co.* v. *Broughton*, 7 Wage Hour Rept. 1168 (C. C. A. 5, 1944).

> liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Petitioner in No. 445 contends that the word "unpaid" may be construed as meaning wages not paid at the time suit is instituted, rather than wages unpaid when originally due.[14] But the courts have not adopted the suggested construction, which logically would terminate all liability upon payment of the statutory wage before suit, however tardily, irrespective of a release. All agree that mere payment in itself is insufficient to terminate the statutory liability.[15]

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[14] The circuit courts of appeals have uniformly held that the words "unpaid wages" refer to wages which are "not paid when due in the regular course of employment". See the *Lofton*, *Rigopoulas*, *Birbalas* and *Broughton* cases cited in note 8, *supra* and also *George Lawley & Son Corp.* v. *South*, 140 F. (2d) 439 (C. C. A. 1), certiorari denied, 322 U. S. 746. The Act does not specify a time for payment, but we think it clearly implies that payment must be within a reasonable time. Ordinarily this would be on the payday specified in the contract of employment, but under special circumstances payment of the full amount due under the statute might be lawful if not unreasonably delayed.

[15] This Court refused to grant certiorari as to the question whether recovery of liquidated damages is precluded by the voluntary payment of the full amount of the base pay prior to the institution of the suit. This was the first issue presented in the petition for certiorari in No. 445.

The language of the Act is not helpful in determining whether the employer's liability for liquidated damages was intended to be an integral part of the employee's right to wages, in which the public has an interest, or a purely personal right capable of being surrendered, the point on which the lower courts have divided. Nor are the few references to the liquidated damage clause in the legislative history of the Act of any assistance. 83 Cong. Rec. 9255, 9264.[16]

In the absence of specific light from the words or history of the law, it is necessary to consider the effect of the suggested interpretations upon the accomplishment of the general policy embodied in the Act.

The liquidated damages are required to be paid as compensation to the aggrieved employees, not as a penalty, although of course they also have and were presumably intended to have a deterrent effect upon the employer. They were designed to compensate the employee for the injury suffered over and above the loss of his wages. Inasmuch

[16] Petitioners rely on the fact that the statute, as originally drawn, contained a provision that—

"Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void." (Section 17 (b), S. 2475, as passed by Senate, 75th Cong., 1st Sess., 1937).

This provision was obviously omitted from the bill because considered superfluous. See Brief for Respondent in No. 445, pp. 24–25.

as Section 16 (b) provides separately that the employee should be allowed "a reasonable attorney's fee * * * and costs of the action", it is clear that the object of the liquidated damages was not to reimburse him for the expense of litigation but for the very real, though not readily measurable, harm which results from delay in payment of wages. An employee who is entirely dependent on his wages, and who has no substantial savings, may be unable to pay bills, or insurance premiums, or payments on his home when due. Insurance or property may be lost, or credit impaired, or he may be unable to incur medical expense for himself or his family when needed."[17] In *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583–584, this Court recognized that

> The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.

The very economic inequality between employers and employees which underlies the statute aggravates these consequences. Cf. *Post* v. *Fleming*, 7 Wage Hour Rept. 1206 (C. C. A. 2, 1944).

[17] "For the great number of wage earners who are completely dependent each week upon their wages it is important to receive their pay without delay" and "even a short delay causes hardship" and "brings want and privation." *Labor Laws and Their Administration*, 1936, Bulletin No. 629, United States Department of Labor, Bureau of Labor Statistics, p. 139. (Report of Committee on Wage Collection Laws).

The employee, with his inferior resources, will generally grasp eagerly at the first opportunity to obtain payment of the back wages in cash; the immediate tangible benefit will generally outweigh in his mind full compensation for any damages he may have suffered. And often the employee will be totally unaware that he is entitled to more than the back pay which the employer is offering him. In such cases, even though the employer, who would normally have greater knowledge as to the employee's statutory rights, makes no overt misrepresentation, the release will have been obtained by an overreaching incompatible with the statutory scheme for the compensation of the employee's losses.

The liquidated damage clause, though not a penalty, also serves to effectuate the policy of the statute by discouraging violations. The ease with which an employer can secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that Section 16 (b) should have. If the employer knows that he cannot escape his liability for liquidated damages by taking advantage of the pressing needs of his employees, he will be more likely to comply in the first place.

The effect of permitting liquidated damages to be released upon the accomplishment of the policy of the Act is not entirely one-sided, however. The primary purpose of the statute is to insure compliance with Sections 6 and 7. This primary

object is attained when the wages specified in those sections are paid. Often compliance with these provisions may be more readily secured if settlement can be made on the basis of restitution of the unpaid wages without the liquidated damages. In such cases the liquidated damage clause may be said to have achieved its purpose as a deterrent by inducing payment of the primary amounts due without further delay or the need for litigation.

That the disposition of claims under the Act on the basis of payment of the amount of the unpaid wages is not necessarily inconsistent with the policy of the Act is indicated, at least to some extent, by the practice both of the Administrator and of the Department of Justice. The Administrator has disposed of thousands of cases of violation, with and without litigation, on the basis of restitution of the unpaid wages alone. This occurs in the course of investigations, in which violations are discovered, and also in the negotiation of consent decrees.[18] Often as a practical matter the employer will agree to restitution of the base liability, but not the liquidated damages. The Administrator cannot compel the payment of the latter, and there is a good chance that the employees, or many of them, will never assert their rights themselves. The collection of the base liability, even though it may not fully reim-

[18] See, e. g., *Walling* v. *Miller*, 138 F. (2d) 629 (C. C. A. 8), certiorari denied, 321 U. S. 784.

burse the employees, is in their interest and in conformity with the purposes of the Act. Furthermore, it eliminates some of the competitive advantage which the violating employer may have derived from past underpayments, and also serves as a token of his *bona fide* intent to pay full statutory wages in the future.

In disposing of cases on this basis the Administrator informs employers that the restitution is without prejudice to the employees' rights to liquidated damages under Section 16 (b). Indeed, where the employer insists upon a release from the employees, instead of the usual formal receipt (printed on page 18 of Petitioner's brief in No. 445), the Wage and Hour Division informs the employer that it does not approve or recognize the substitute form. The Administrator is thus extremely careful not to nullify any rights of the employee to liquidated damages; he properly recognizes that he has no authority to enforce or to foreclose such rights.

Nevertheless, both the Administrator and the employer, and also the employees, if they or their representatives participate in the negotiations, probably anticipate that the settlement upon which they agree will in practical effect be final, and that the employees will not sue for liquidated damages. That is generally what happens, particularly with respect to the vast majority of the employees who remain in the service of the employer.

Moreover, the Department of Justice is a party to settlements in which the employees do not receive full liquidated damages. The Department customarily defends actions brought against Government cost-plus contractors for wages due under the Fair Labor Standards Act, inasmuch as the expense of such litigation must eventually be borne by the Government. When employees sue such contractors under the Act, the contracting agency of the Government (customarily the War or Navy Department) makes an independent investigation of the merits of such claims, and if not satisfied that the claims are valid submits the matter to the Administrator of the Wage and Hour Division for determination of liability. The contracting agency accepts his ruling, unless convinced it is clearly erroneous, in which case the matter is submitted to the Assistant Attorney General in charge of the Claims Division of the Department of Justice. If it is decided by the contracting agency, the Administrator, or on appeal by the Assistant Attorney General, that the employee should prevail, the United States Attorney handling the case is directed to negotiate a tentative settlement with the employee's counsel for submission to the contracting agency for acceptance or rejection. The wages due are of course always paid, but the claim for liquidated damages is the subject of bargaining, and almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages. After payment of

the amount agreed on, a judgment is entered dismissing the suit with prejudice, thereby preventing the employee from seeking to recover more on the same claim.

The factors which we have mentioned suggest, to us, the difficulty and perhaps the inadvisability from the standpoint of the policy of the Act of framing a sweeping generalization that all releases of liquidated damages are either valid or invalid. We do not think, however, that there is great difficulty in distilling from them sufficient of principle to decide the cases now before the Court.

A distinction may be drawn, for example, between situations where the employees' interests were safeguarded by counsel or a government agency, and situations in which dealings took place directly with the employee himself. In the former case, there may be adequate reason for recognizing the release. Where those safeguards are not present, where the employee's inferior bargaining position is accompanied by ignorance of his right to more than the unpaid wages, the obtaining of a full release by the employer in return for payment of only the wages constitutes an overreaching not compatible with the policy of the statute.

These principles, as well as those applicable to releases generally, require, in our view, the conclusion that neither of the releases at bar is valid. Examination of the record in No. 445 indicates that O'Neil, a night watchman, was unaware of his right to an amount in excess of the unpaid wages, and that

the bank carefully refrained from informing him (R. 23–24, 54–55, 64–66, 11–12). This is typical of the situation in which we think that Congress would not have intended an employee to be deprived of the full compensation allowable under the law.

In No. 554, although Maddrix may have known his rights, the original release was void because Dize had not paid even the amount due under Section 7. See p. 10, *supra*. Subsequently a check covering the remainder of the unpaid wages was tendered Maddrix' counsel as full payment of the statutory obligation. Whether or not acceptance of that check by counsel would have constituted a valid release, the check was returned. The informed employee clearly has a right to decide not to settle the claim for less than the total amount of liquidated damages and to insist that the full amount be paid.

Furthermore, we do not think that at the time the releases in these cases were given, there was the *bona fide* dispute as to liability which all the courts hold necessary to supply the requisite consideration. See note 10, p. 12, *supra*.

In No. 445, the employer decided to pay his employees following the decision by this court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, which clarified the law on coverage of maintenance employees in buildings occupied by producers of goods for commerce. While the release recites

the existence of a doubt as to the employee's coverage and the amount due him, the record indicates the absence of any dispute. The employer simply paid the employee without any argument or even discussion concerning the number of hours worked or coverage under the Act (R. 23). While this voluntary payment of back wages is to the employer's credit, it is quite inconsistent with the existence of an "active controversy" (*Union Producing Co.* v. *Pardue,* 117 F. (2d) 225, 227 (C. C. A. 5)) between the parties. Indeed there would have been no reasonable basis for the existence of any controversy. As already indicated (see *supra* p. 4n), coverage under the Act seemed clear under the *Kirschbaum* decision, and the amount due, far from being in dispute, was computed by the employer himself. The statements in the "form release" (R. 64) intended to indicate the existence of a dispute were certainly not "bona fide and based upon real faith that the demand is not meritorious," but were rather "fabricated for use as a pretext to evade the discharge of an obligation." *Schuttinger* v. *Woodruff,* 259 N. Y. 212.

There was likewise no "active controversy" and no "actual and substantial difference of opinion" *Post* v. *Fleming,* 7 Wage Hour Rept. 1206 (C. C. A. 2)) in the *Dize* case. The employee's demand was made after the employer had consented to the entry of an injunction decree in a suit brought by the Administrator under Section 17 of the Fair

Labor Standards Act (R. 44), which conclusively determined coverage under the Act." See *Birbalas* v. *Cuneo Printing Industries,* 140 F. (2d) 826 (C. C. A. 7). Nor was there any dispute as to the amount due the employee. While the parties were somewhat uncertain as to the exact amount, they were both in touch with the Wage-Hour inspector at Salisbury, Maryland, who had inspected petitioner's books (R. 19–20), and it was through him that both knew that the amount owed was between seven and eight hundred dollars (R. 20, 31–33). No question as to the amount was raised before the court (R. 10–15).

Thus assuming, as we do, that a release of the statutory right to liquidated damages under the Fair Labor Standards Act might be valid under some circumstances (*supra,* pp. 17–20) and if based

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[19] In fact, as indicated above (*supra*, p. 6n), the employer admitted coverage in his answer and only raised this issue, obviously as an afterthought, on appeal to the Fourth Circuit. And it may be noted that the Fourth Circuit summarily rejected petitioner's contention that Maddrix was not covered under the Act, stating: "This case is practically on all fours with *Enterprise Box Co.* v. *Fleming*, 125 F. (2d) 897, cert. den. 316 U. S. 704. * * * Nor are we impressed by the contention of *Dize* that he falls within the exemption set out in Sec. 213 (5) of the Act [for fishermen]. * * * As well might we exempt a manufacturer of rubber boots shipped in interstate commerce to fishermen." Thus, as clearly indicated by the Fourth Circuit, there was no reasonable basis for any dispute on coverage.

on the existence of a *bona fide* dispute, surrender of which is sufficient to constitute a consideration, the releases in the instant cases, we believe, fail to meet that test.

Respectfully submitted,

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APPENDIX

The pertinent provisions of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., sections 201 et seq. read as follows:

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, * * *

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees

affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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